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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x  
4 IN RE: TERRORIST ATTACKS

5 ON SEPTEMBER 11, 2001 03 MD 1570 (GBD)

6 -----x

7 New York, N.Y.  
8 January 24, 2018  
9 2:00 p.m.

10 Before:

11 HON. SARAH NETBURN,

12 Magistrate Judge

13 APPEARANCES

14 MOTLEY RICE

15 Attorneys for the Burnett plaintiffs  
16 BY: ROBERT T. HAEFELE

17 JONES DAY

18 Attorneys for Defendant Dubai Islamic Bank  
19 BY: STEVEN T. COTTREAU

20 MOLOLAMKEN

21 Attorneys for Defendant Dallah Avco  
22 BY: ROBERT K. KRY

23 SALERNO & ROTHSTEIN

24 Attorneys for Defendant Yassin Kadi  
25 BY: PETER C. SALERNO

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(In chambers; phone conference)

THE COURT: Good afternoon. This is Judge Netburn.

I am going to request that those lawyers who intend to be sort of leading this conference state their appearances for the record. I only need those people who are intending to speak to state an appearance because we have a court reporter here, but we are trying to streamline this.

Of course if anybody who didn't previously state their appearance then wants to chime in, I will just ask that you state your appearance at that time.

A few other ground rules. Let me remind the parties that I am holding this conference as a courtesy to all of you, and it requires everybody to pay attention to voice cues and do their best effort to avoid speaking over one another, and to speak as slowly as possible.

In addition, I will ask that every time you speak, if you can just reintroduce yourself so that your statements can be properly attributed.

So let me begin by asking who is here on behalf of the Plaintiffs' Executive Committee.

MR. HAEFELE: Good afternoon, your Honor. Robert Haefele, from Motley Rice, for the plaintiffs.

THE COURT: Thank you.

Anyone else from the plaintiffs intending to speak primarily?

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1           Who is going to be speaking on behalf of the  
2 defendants?

3           MR. COTTREAU: Good afternoon, your Honor. Steven  
4 Cottreau, from Jones Day, on behalf of Dubai Islamic Bank. I  
5 will be speaking on behalf of the defendants on both  
6 jurisdictional discovery and merits discovery.

7           THE COURT: Thank you.

8           I issued my order at the very beginning of the year --  
9 maybe this is my first order of the new year -- identifying a  
10 few areas that I had questions and giving you all an  
11 opportunity hopefully to do some meet and confer between the  
12 sides and also to think about your positions to me.

13           So I think I will just pick up on that order and begin  
14 in the first instance.

15           So let me first talk about the distinction between  
16 merits discovery and jurisdictional discovery.

17           The proposal contemplates, as I understand it, that  
18 those proceedings will run on a parallel course and end at the  
19 same time. I am not quite sure why that has to be and why the  
20 jurisdictional discovery defendants would not wrap up their  
21 discovery sooner.

22           So let me ask Mr. Haefele his view on that issue.

23           MR. HAEFELE: Thank you, your Honor.

24           I think the proposal the way it was, with them running  
25 parallel at the same time, was with the understanding that the

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1 merits and the jurisdictional discovery are so intertwined  
2 that, absent any artificial restrictions on the jurisdictional  
3 discovery process, in our view once we were done with  
4 jurisdictional discovery, we didn't anticipate there being more  
5 needed. That will be especially clear in the case, for  
6 example, of the charity officials who have relied almost  
7 exclusively on the discovery from the relevant charities for  
8 their discovery responses.

9 So we understood the issue to be pertinent to  
10 defendants Kadi, Dallah Avco and the five charity officials.

11 With each of them it was our position, our view, that  
12 if there isn't any artificial blockage of us getting discovery  
13 from the defendants, we anticipated being able to cover both of  
14 the jurisdictional issue while we were doing the merits issue  
15 with the other defendants.

16 THE COURT: Just so I am clear, you anticipate that  
17 you would conduct whatever discovery you would conduct. There  
18 would then be a motion made on the jurisdictional question. If  
19 the court ultimately held that the court did have jurisdiction  
20 over the defendants, you would not seek to reopen discovery for  
21 merits discovery.

22 MR. HAEFELE: I think that's generally right. I guess  
23 the one caveat I would have is if the court specifically  
24 identifies areas that warrant discovery, then I guess we would  
25 go along with what the court identified.

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1 THE COURT: OK. Let me ask you another question,  
2 which I think you implicitly answered. Is there any ability to  
3 front-load jurisdictional discovery such that the subsequent  
4 motion could be filed before all of discovery would be  
5 completed?

6 MR. HAEFELE: I think that that's harder to do with  
7 the charity officials who are explicitly relying upon the  
8 discovery from the other defendants to respond to their  
9 discovery. I think perhaps it's possible to do some of that  
10 with regard to Dallah Avco and Kadi.

11 THE COURT: Mr. Cottreau, do you want to be heard on  
12 this point?

13 MR. COTTREAU: Please, your Honor.

14 First, we agree with the plaintiffs that there should  
15 be no restriction on the depositions to distinguish between  
16 jurisdictional discovery and merits discovery, so long as there  
17 is agreement that each witness will only be deposed once. I  
18 think that we have a lot of depositions already in this case  
19 and to redepose witnesses is horribly inefficient at this  
20 stage. So we are in agreement, no subject matter limitations  
21 so long as each witness is only deposed once.

22 With respect to the suggestion of timing, we are in  
23 agreement with your Honor that the jurisdictional defendants  
24 should be front-loaded in the discovery process, and here is  
25 what we would propose in that regard.

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1           We would propose trying to get through the  
2       jurisdictional defendant witnesses by the fall of this year.  
3       And in particular, we think that for the individual  
4       jurisdictional defendants, the natural persons who are  
5       jurisdictional defendants, of which there are six, we should  
6       try to get through those in the first three months of  
7       depositions. So by the end of June.

8           And Dallah Avco, I understand, is a little bit more  
9       involved. They have already listed at least six people who are  
10      document custodians and have relevant information. On behalf  
11      of Dallah Avco, we think those depositions that relate to  
12      Dallah Avco can be wrapped up by September, the end of  
13      September of this year, with the idea being that motions for  
14      dismissal on the basis of jurisdiction could be renewed and  
15      briefed by the end of the year with hopefully a decision  
16      forthcoming in the first quarter of next year.

17           What that would permit, your Honor, is for those  
18      defendants in jurisdictional discovery to know whether they are  
19      going to remain part of this case on the merits and to still  
20      have an additional six months from September -- I'm sorry, from  
21      April of 2019 until the close of depositions in September of  
22      2019 to take any affirmative depositions that they may want on  
23      the merits.

24           So we think that that's the best way to streamline  
25      this case and keep the jurisdictional defendants, if they are

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1 to remain in the case, on the same discovery track that the  
2 defendants who are in merits discovery are already on.

3 THE COURT: Well, that proposal assumes two things  
4 that are, as we say, not in evidence, which is, one, that I  
5 think it's appropriate for depositions to go all the way  
6 through till September of 2019, and, two, that a motion that's  
7 filed at the end of 2018 would be decided by, I think you said  
8 April of 2019. I don't know that either of those things are  
9 self-evident.

10 Assuming that those two things do not stand, do you  
11 still think it makes sense to try and front-load the individual  
12 jurisdictional defendants' depositions, recognizing that I  
13 think in all likelihood you would not have a decision on the  
14 merits of that jurisdictional motion before the close of fact  
15 discovery?

16 MR. COTTREAU: Well, your Honor, with respect to the  
17 briefing of the jurisdictional motions, we didn't anticipate  
18 that the motion to dismiss would be brought by the end of the  
19 year, this year 2018; it would be that they would be fully  
20 briefed by then so that we could put together a reasonable  
21 briefing schedule. If discovery of individuals were done in  
22 the first three months of discovery, obviously they can start  
23 to move to dismiss as soon as the end of summer.

24 But I hear your Honor that it is presumptuous. It was  
25 only made as a proposal for the court to try to streamline

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1 discovery here and not cause any delay as a result of certain  
2 jurisdictional discovery issues remaining outstanding.

3 THE COURT: Right. My only point was, just to be  
4 clear on that, I would want your proposal to be premised on the  
5 guarantee that there would be time on the back end after a  
6 decision was issued. Obviously Judge Daniels is handling these  
7 motions. I don't know whether he would refer to me for R&R,  
8 which would only add time, I think.

9 But in any event, regardless of whether there is a  
10 report and recommendation or whether he does it in the first  
11 instance, I wouldn't assume that from full submission that  
12 there will be a three-month turnaround. That's my only point.

13 MR. COTTREAU: Yes. I understand, your Honor.

14 The hope here would be that if the jurisdictional  
15 defendants are getting out of the case they wouldn't be forced  
16 to participate in all the other merits-related depositions as a  
17 contingency.

18 MR. HAEFELE: Your Honor, there is one other concern  
19 that I have with the proposal that Mr. Cottreau put forward,  
20 and that is what I highlighted when I spoke a few moments ago,  
21 that the individual defendants, charity official defendants are  
22 relying on the discovery from the charities. That's part of  
23 the merits discovery. So it's hard for us to finish the  
24 jurisdictional discovery regarding those folks when they are  
25 relying on the discovery from the other folks.

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1 THE COURT: Which is to say that you need to take  
2 depositions of people from IIRO before you can defend a motion  
3 to dismiss?

4 MR. HAEFELE: That would be true for IIRO and Muslim  
5 World League.

6 THE COURT: I don't know that we need to sort of work  
7 out this fine issue on whether or not to front-load the  
8 witnesses right now, but this is helpful. So now I have a  
9 better sense on that particular issue.

10 Let's now talk about numbers. I believe that the  
11 proposal was that the plaintiffs should take 100 depositions,  
12 that the defendants' view was that 50 was a reasonable number,  
13 and that in any event there should be parity between the  
14 numbers.

15 So I wanted to challenge both of those propositions,  
16 first talking about the numbers, and I know that the plaintiff  
17 identified dozens and dozens of people that they might be  
18 inclined to depose from the various organizations, which got to  
19 a number close to 200. But let me hear from both parties. I  
20 guess let me hear first from the plaintiff on the number.

21 Why don't you go ahead and speak as to the number and  
22 your view, if you have one, about whether the defendants should  
23 have an equal number.

24 MR. HAEFELE: Your Honor, I guess I will reverse the  
25 order, then, because I think our position is a soft one on

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1 whether there should be parity in the sense that we don't  
2 really have a strong position as to whether there should be  
3 parity other than to say we think that the defendants just  
4 don't need as many depositions as the plaintiffs do. But that  
5 being the case, I will address the latter part.

6 Let me emphasize from the very get-go, I think the  
7 overarching principle here is the plaintiffs don't want to take  
8 anymore depositions than needed either to prove the case for  
9 the individual plaintiffs or there are a number of depositions  
10 that we would need to take because the defendants have  
11 identified witnesses with regard to their defenses.

12 On that point, if we just went through and looked at  
13 the Muslim World League/IIRO, collectively, taking out the  
14 duplications, they have identified 42 witnesses that they would  
15 put forward for their defenses; World Assembly of Muslim  
16 Youth, or WAMY, has identified 34; Dubai Islamic Bank has  
17 identified I think 16, Jelaidan has identified five, and we  
18 haven't seen the witnesses that Kadi, Dallah Avco, or the  
19 charity officials, including Mr. Al-Buthe, would identify.  
20 Collectively, if we just had those, I think we are up to about  
21 97.

22 THE COURT: Can I ask you to speak a little bit more  
23 slowly, particularly when you're identifying complex names.

24 MR. HAEFELE: Yes. Thank you.

25 If we just look at the witnesses that the defendants

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1 themselves have identified, who obviously we would need to  
2 depose those witnesses to prevent a situation where we are at a  
3 motion to dismiss and suddenly we are getting a declaration  
4 from somebody we never had an opportunity to speak to. Even  
5 looking just at those, it's around 100. And that's before we  
6 add any of the distinct individuals that aren't on their  
7 witness list that we would need to prove our case.

8           Then if we go through the individual defendants -- I  
9 think we have been able to cull down our witness list. I am  
10 talking distinct from who is on the defendants' witness list.  
11 In other words, I am not counting people who are already on the  
12 defendants' witness list.

13           My witness list, just to be clear, I am talking about  
14 Rule 26 disclosures.

15           For Muslim World League/IIRO, I think I said they  
16 identified 42 total. I think we would need an additional 17.

17           WAMY, World Assembly of Muslim Youth, they identified  
18 34. I think we would need in the range of about 10 additional,  
19 and that brings us to 44 total.

20           Dubai Islamic Bank, they have identified, I think it's  
21 16. We would need a total of about 21.

22           And that's not addressing -- there are pending search  
23 results that are still due in discovery, and we haven't been  
24 able to address those additional witnesses that might be  
25 identified there.

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1           For Wa'el Jelaidan, I think most of the discovery  
2 would be covered by other defendants, so I am not adding any  
3 additional. There are witnesses, obviously, who would be  
4 specific to him, but I think they are covered by the other  
5 defendants.

6           As to Mr. Kadi, I think we have identified 11.

7           As to Dallah Avco, we have identified 21.

8           Then as to the charity officials, I think they are  
9 covered by Muslim World League/IIRO, and Mr. Al-Buthe is  
10 covered by -- probably we could cover him in about five  
11 additional witnesses.

12           If we add all of those up, the number that I got to  
13 was 163.

14           Our impression is there will be some witnesses that  
15 won't be available, and there will be some witnesses that we  
16 will be able to cull down based on the witnesses whose  
17 depositions we take, and we are committed to getting to the  
18 number 100, which is where we were.

19           What I can do, if your Honor is inclined and if you're  
20 interested in hearing it, I can go defendant by defendant and  
21 tell you the categories of the witnesses and why we think they  
22 are necessary, but I wanted to give you the numbers upfront.

23           THE COURT: I don't think I need an oral report on  
24 that. After this call I am going to take all of this under  
25 advisement and if I think it will be useful, I will ask for a

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1 written submission setting forth that.

2 Mr. Cottreau, do you have a sense, now that the case  
3 has developed further, whether or not your witness list, your  
4 26(a) witness list, would otherwise be culled down at this  
5 point?

6 MR. COTTREAU: I know that the defendants are all  
7 going through the process in front of you in the deposition  
8 protocol. As part of that protocol, the parties jointly agreed  
9 and proposed as part of the last submission to you that the  
10 parties revise their witness list by March 2nd. And so I think  
11 everyone is taking a very hard look right now in anticipation  
12 that the parties have agreed on that supplementation date and  
13 that your Honor hasn't raised an issue with it.

14 So it is certainly our hope that we will all cull down  
15 our witness list to the point, including the plaintiffs  
16 hopefully, to the point where we can come up with a realistic  
17 deposition schedule of the priority witnesses on those lists.

18 THE COURT: OK. Well, that's helpful and people  
19 should definitely be working toward that date, even though I  
20 haven't entered the protocol yet. That date is firm. So the  
21 parties should be complying with that date.

22 Do you want to speak to the issue of parity?

23 MR. COTTREAU: Yes, your Honor.

24 On the issue of parity, the primary reason why we  
25 believe that we need as many depositions as the plaintiffs is

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1 because we always start with the plaintiffs' last witness  
2 disclosure, which is 171 witnesses that they say they have the  
3 present intention to obtain testimony from or to secure a  
4 declaration from.

5 A lot of those witnesses are witnesses that are either  
6 members of al Qaeda -- we don't have any information as to  
7 whether the plaintiffs have had access to information from  
8 those individuals -- and also government officials. Again, we  
9 have no idea whether plaintiffs have been talking to these  
10 government officials or not.

11 So our view would be that we need to depose these  
12 people or else we face the possibility that there would be a  
13 declaration from these people that we couldn't rebut at summary  
14 judgment.

15 So our intention would be to try to prioritize as best  
16 we could, collectively on the defense side, the 171 witnesses  
17 that plaintiffs have named and get that down within whatever  
18 limit your Honor sets. Obviously that's going to require  
19 incredibly hard choices by our side, but we understand that we  
20 are up against the limitations of time and resource here. So  
21 we will have to do that.

22 I just point out for your Honor a couple of points.

23 One is that Federal Rule of Civil Procedure 30(a)(2)  
24 recognizes this parity principle by limiting presumptively  
25 depositions on both sides, as you know, to ten witnesses per

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1 side, as well as the VW case that plaintiffs themselves cite  
2 recognizes parity. In light of the fact that plaintiffs named  
3 171 witnesses and the defense, by our count, included 115 names  
4 on their list, we probably have as many hard choices but  
5 probably more than the plaintiffs do in trying to whittle it  
6 down within whatever limitation your Honor sets.

7 MR. HAEFELE: May I respond?

8 THE COURT: Sure. Let me just ask one question to  
9 both of you, which is, when the March 2nd witness list comes  
10 around, are the parties intending voluntarily to identify those  
11 witnesses that they intend to secure a declaration from so that  
12 each side can make a reasoned decision about deposition  
13 testimony?

14 Mr. Cottreau, why don't I ask you first.

15 MR. HAEFELE: Thank you, your Honor.

16 That wasn't something that obviously we had  
17 contemplated under the existing procedure. It's certainly  
18 something that we could consider doing on our side.

19 I suppose we might have a present intention of  
20 securing a declaration from someone at this juncture, but in  
21 the event that that person was deposed, it may be that we would  
22 just rely on the deposition testimony. But I understand your  
23 Honor's concern here.

24 THE COURT: Right. It seems like it might be helpful  
25 to know which witnesses they are intending declaration

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1 testimony, the parties are intending declaration testimony, and  
2 also to give some inside information. This should not be a  
3 process of surprises.

4 So to the extent that the plaintiffs are identifying  
5 al Qaeda witnesses or government witnesses, I think it would be  
6 useful to know whether or not those people are on the list  
7 because the plaintiffs realistically and reasonably believe  
8 they are going to be able to secure their testimony one way or  
9 another, either deposition or declaration, or whether they are  
10 just on the list but the plaintiffs recognize that the  
11 likelihood of securing those depositions or declarations is  
12 slim.

13 For instance, I understand, I believe, that there are  
14 some witnesses who are in Guantanamo right now and whether or  
15 not there is any realistic belief that those people will  
16 ultimately be deposed.

17 MR. COTTREAU: Your Honor, I have to say just from our  
18 side as defendants, we would welcome that process, in part  
19 because we are all a little bit weary of some of the  
20 gamesmanship that we believe the plaintiffs have engaged in on  
21 their side. And specifically I am referring to the fact that  
22 they went and took a unilateral, I will call it a deposition,  
23 but we weren't even invited to participate, a unilateral  
24 deposition of Zacarias Moussaoui. He was in super max, where  
25 you would think it would be very difficult to get access to

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1       them. They did that with no notice to us and they relied on  
2       his testimony in their papers in this case.

3               THE COURT: Mr. Haefele, any objection to disclosing  
4       in the March 2nd disclosure those witnesses about whom you  
5       intend not to depose but to seek a declaration from, and also  
6       indicating those witnesses who you would otherwise like to  
7       depose but you have no realistic pathway to them?

8               MR. HAEFELE: Your Honor, I think my answer generally  
9       is similar to what Mr. Cottreau said, except that I would say  
10      that -- the way our disclosure that we provided came about was  
11      a bit different in the sense that we really didn't identify, as  
12      the defendants have, the witnesses that are their own witnesses  
13      that they would put forward. If you look at their witness  
14      list, by and large most of them are individuals that are  
15      beholden to the defendants. They are current or former  
16      employees or officials.

17              The witnesses that the plaintiffs put on their list,  
18      we tried to be as inclusive as to those people that we thought  
19      had information that we would be trying to get witness  
20      testimony from.

21              The notion that we have control over these people and  
22      have a present-sense intention or ability to get declarations  
23      from them is -- I think your Honor has sort of indicated  
24      already she understands -- is not the case. That's by and  
25      large true.

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1           If I could go back for a moment, your Honor. Did I  
2           answer your question? I want to respond to something else.

3           THE COURT: I think so. I guess I would summarize it  
4           by saying you don't think you could identify who you're going  
5           to put forward as a declarant and who you would depose.

6           MR. HAEFELE: I think that's true, but I would say,  
7           though, that we would certainly intend to cull down the list  
8           significantly, as I think I intimated when I was identifying  
9           the numbers earlier.

10          THE COURT: What I want to avoid here, because this is  
11          not your average case, I want to avoid the problem that happens  
12          in most cases where people overdesignate as a CYA and everybody  
13          is left with some guessing game. This litigation should not be  
14          run that way. So I want the parties to be more transparent  
15          than their litigation strategies might otherwise incline them  
16          and be clear that these are the people we are truly intending  
17          to depose and be clear, if you know, that there are people on  
18          the list who you're putting as a witness but you have no  
19          intention of deposing them because you know you're going to get  
20          a declaration, and it seems to me that's information that your  
21          adversary should know.

22          MR. HAEFELE: Understood, your Honor.

23          I just wanted to reiterate that there was a difference  
24          between how the lists were created previously defendants versus  
25          plaintiffs.

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1 I also wanted to hit on one point that Mr. Cottreau  
2 said about the VW case. In the VW case the order was  
3 specifically related to discovery that would entail discovery  
4 that defendants would be doing of plaintiffs, for example, for  
5 damages, I believe. So it contemplated discovery coming from  
6 the plaintiffs as well as from the defendants.

7 I think if you look at that particular order, which I  
8 believe was cited and may have been included -- I can't  
9 recall -- there is a distinct notion that the discovery would  
10 be bilateral because it entailed discovery both for damages and  
11 liability.

12 THE COURT: Right. That's what led me to ask the  
13 question of the defendants as to why there was a need for an  
14 equal number of witnesses if this is really liability  
15 discovery, whether or not the defendants, having access to the  
16 primary people that are going to be deposed by the plaintiffs,  
17 really have a genuine intention of deposing an equal number of  
18 witnesses.

19 MR. COTTREAU: There is also another consideration in  
20 this case from our perspective, which is that we may not be  
21 able to get witnesses on the defense side that we would  
22 ordinarily expect to come to trial, to be available for trial  
23 because of visa and other travel-related issues. So it may be  
24 in this case that we depose witnesses in discovery that we  
25 wouldn't ordinarily depose in a case on the chance that they

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1 couldn't get a visa at the relevant time.

2 As you know, the political situation with respect to  
3 visas right now is very unpredictable and who knows how that's  
4 going to play out in the future. But I would make no  
5 guarantees in three or four years about which witnesses that  
6 were even current employees of my client could be able to get a  
7 visa to appear to testify in court.

8 So there is some different considerations in this case  
9 in light of the fact that it is so international in nature.

10 THE COURT: Right. I think this is a perfect segue to  
11 the other topic I wanted to discuss, which is the topic of  
12 counting depositions in the context of de bene esse depositions  
13 which, to be clear, I would not include the potential visa  
14 difficulties as falling into that category. But to the extent  
15 there are depositions that a party seeks for preservation  
16 purposes -- well, as I am speaking I am thinking. Maybe  
17 somebody that you genuinely think will never be allowed in the  
18 United States to testify would be a preservation deposition.

19 In any event, there was a view that any discovery  
20 deposition taken of a preservation deponent would not count  
21 toward the ultimate number, and I wanted to hear arguments as  
22 to why that is so.

23 MR. HAEFELE: I have got to confess, I am not sure I  
24 understood your Honor's question.

25 THE COURT: Sure.

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1           It's the final paragraph in my order. It begins with  
2   "third," which is this question about counting depositions. As  
3   I understand it, there was a dispute between the parties. If a  
4   party wanted to take the deposition of a witness to preserve  
5   that testimony and the other side wanted a, quote-unquote,  
6   discovery deposition in advance of that preservation  
7   deposition, there was a dispute among the parties as to whether  
8   or not that discovery deposition, taken in advance of the  
9   preservation deposition, should count toward the number that  
10   the court sets as far as the limit of depositions.

11           MR. HAEFELE: I don't know who you want to hear from  
12   first, but I am happy to talk about that.

13           THE COURT: Sure.

14           MR. HAEFELE: I think putting it in context, and I  
15   know your Honor's order indicated that it was the defendants'  
16   proposal and that's where you got the language from, but I will  
17   confess on behalf of Mr. Cottreau and me that I think that was  
18   language that we had bandied about and I am not sure that it's  
19   attributable just to them.

20           It comes up really in the context of Dr. Hassan's  
21   deposition that happened a few months ago. I think that's a  
22   good example of where the confusion comes from as to how they  
23   should be counted. If you recall, Dr. Hassan was a member of  
24   the DIB Sharia Board, who the plaintiffs had identified on  
25   their witness list as somebody that they thought had

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1 information. Now whether we intended to depose the witness or  
2 whether we intended to use him as a witness at trial was a long  
3 way away when we identified him in our Rule 26(a) disclosures  
4 in 2010, I think. But DIB insisted that they needed to take  
5 his deposition before the other depositions started. We didn't  
6 know whether we were going to take his deposition or not. But  
7 DIB was very clear they wanted to take his deposition for a  
8 variety of reasons.

9 Our view was that if they were going to take his  
10 deposition and they wanted to do it to preserve his testimony  
11 for trial that we needed to take a discovery deposition to know  
12 what his trial testimony would be. And so we did that, and we  
13 ended up doing it such that the plaintiffs did a discovery  
14 deposition and then DIB did their cross-examination and they  
15 did a trial deposition.

16 The question comes up how all of those get counted  
17 when it was DIB that initiated wanting to do the deposition in  
18 the first instance, and I don't know whether the plaintiffs  
19 would have used that as one of their 100 depositions.

20 I think that's where the battle, if you will, started  
21 with regard to this particular paragraph, is how do you count  
22 those depositions.

23 I think our position is what we ended up setting out  
24 in our proposal that -- obviously, I think your Honor is right  
25 that any de bene esse depositions don't be counted at all, I

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1 think is what you said.

2 THE COURT: It seems to me that the most faithful way  
3 to calculate all of this is that a de bene esse deposition  
4 would not count because that would be trial testimony. So it  
5 would be testimony that was going to be held in reserve in case  
6 the witness could not testify at trial.

7 It's not obvious to me why the opposing side, learning  
8 that there was a desire to preserve this witness's testimony,  
9 which is sort of the same as an intention of calling that  
10 witness at trial, why the discovery deposition should be  
11 treated any differently than if the witness was just a regular  
12 trial witness.

13 MR. COTTREAU: The defendants are in agreement with  
14 that view.

15 THE COURT: I appreciate that you're being maybe  
16 forced to make your decision in response to the designation of  
17 a witness being called for a de bene esse deposition, but I  
18 don't think that's materially different than learning that that  
19 witness is going to be called at trial and then the plaintiff  
20 making a decision whether or not they wanted to take a  
21 discovery deposition.

22 MR. HAEFELE: The dilemma comes up in the following  
23 matter. I think some of it applies to whether there is parity  
24 and the number of depositions each side gets and, quite  
25 frankly, whether there is gamesmanship that happens. If there

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1 is parity, then the defendants just don't need these  
2 depositions. When they start adding witnesses who will testify  
3 at trial or get declarations from and suddenly we need to fill  
4 in all of the depositions that we need, running around, making  
5 sure that we are covering the depositions that they may get,  
6 but they are not actually useful to what the plaintiffs need.

7 THE COURT: Well, I guess one sort has to adopt some  
8 level of conspiracy theory in the way that they are handling  
9 this case, which I am not prepared to adopt at this point.

10 MR. HAEFELE: Your Honor, I'm sorry. If you look at  
11 Dr. Hassan's deposition, that's a good example. They insisted  
12 that his deposition go forward, but yet he is not even on their  
13 current Rule 26 disclosure.

14 MR. COTTREAU: If I could maybe respond.

15 THE COURT: Sure.

16 MR. COTTREAU: One is, it's our view that we are going  
17 to proceed in good faith here, and understand that if we call a  
18 de bene esse deposition, there is going to be a reason for it  
19 and that that reason will be disclosed to plaintiffs and if  
20 they want to challenge that reason, that's fine by us. In  
21 terms of bringing it to your Honor's attention, our hope would  
22 be that through meet and confers in good faith on both sides we  
23 can avoid this whole issue.

24 With respect to Dr. Hassan, he was an 84-year-old  
25 gentleman that plaintiffs injected into this case in their July

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1 2015 motion to compel with a long litany of allegations against  
2 the body that he was the chairman of. For that reason we  
3 wanted to preserve his testimony. We didn't interject him into  
4 the case. Plaintiffs did. But we wanted to preserve rebuttal  
5 to plaintiffs' allegations.

6 THE COURT: I understand the issues.

7 Mr. Cottreau, can I ask you to speak to the comment --  
8 in your proposal to this same paragraph 38, you reference both  
9 depositions to perpetuate testimony and then you say, "or  
10 notices the deposition of its own witness." I wasn't sure what  
11 you meant by that.

12 MR. COTTREAU: I don't think it's that important in  
13 light of your Honor's proposal, potentially, that the de bene  
14 esse depositions would not count as discovery depositions  
15 towards the numerical limitations.

16 But all we were trying to capture, and it was probably  
17 inartful, was if you were a current or former employee or if  
18 you were an individual yourself. So that's all we were trying  
19 to capture with that concept. But I agree it's ambiguous and  
20 probably that language, in light of your Honor's order and the  
21 idea for the approach here with respect to these numerical  
22 limitations, the language is probably outmoded.

23 THE COURT: You would concede that if you decided to  
24 call the president of Dubai Islamic Bank for a deposition, not  
25 for a de bene esse deposition, but if you wanted to take that

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1 witness's deposition, that that would count toward your limit?

2 MR. COTTREAU: Yes, subject potentially to the idea  
3 that we had no faith that he would be able to travel to the  
4 United States to give live testimony. If we had some basis for  
5 that and can present that, we would want to preserve the  
6 ability that that could be a de bene esse deposition.

7 MR. HAEFELE: Your Honor, that's raising the issue  
8 that we are concerned about, is that suddenly, because many of  
9 these witnesses are out of the country, many of them will be  
10 noticed as de bene esse depositions and we will be left having  
11 to use all of our depositions or many of our depositions to  
12 address getting testimony from the witnesses before they go on,  
13 quote-unquote, the witness stand.

14 THE COURT: Why can't we set the rule that a witness  
15 who currently would be unable to come to the United States,  
16 either because he is on a no-fly list or a terrorism list or  
17 whatever it is, the witness would not be able to come to the  
18 United States now might make that person eligible to be a de  
19 bene esse deposition, but sort of the fear that that person  
20 might not be able to come because immigration law may change is  
21 not an adequate basis. Would that be a standard that the  
22 parties could adopt?

23 MR. COTTREAU: Your Honor, that would be fine by us  
24 with only this caveat. To my knowledge, none of my client  
25 representatives at Dubai Islam Bank are on a no-fly list or

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1 terrorism list. Instead, they are people from countries that  
2 are not regarded as safe countries by the current  
3 Administration.

4 So we may have witnesses, for example, that are from  
5 countries like the Sudan who are employed by the bank, who are  
6 able to travel freely within the Middle East, but could not  
7 travel to either Western Europe or the United States.

8 So with that clarification, so long as we could put  
9 forth a record to your Honor for applying for visas and either  
10 having no action taken on them or having them being  
11 affirmatively rejected, we would be in agreement with that  
12 idea.

13 MR. HAEFELE: Your Honor, our concern continues to be  
14 that if the bulk of the defendants' witnesses end up becoming  
15 in some matter depositions that don't count against them but  
16 they are their witnesses, we are then in a situation -- and  
17 they would depose them otherwise, but they are deposing them in  
18 a matter of de bene esse because they are not available to come  
19 to the U.S., now we have to do a discovery deposition in  
20 advance and we don't want that to count against us.

21 THE COURT: OK. All right. I understand the parties'  
22 view.

23 MR. COTTREAU: If I could make one suggestion which  
24 may be helpful in terms of the parties' planning.

25 THE COURT: Yes.

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1 MR. COTTREAU: If we could potentially have a view as  
2 to whether witnesses could be allowed to testify by video at  
3 trial, that could be very helpful here in maybe reducing the  
4 number of depositions or reducing the workload of trying to  
5 determine whether people are eligible to travel to the United  
6 States at this juncture.

7 THE COURT: Mr. Haefele, do you have a view on that?

8 MR. HAEFELE: I am not clear on what the proposal is,  
9 but I could tell you that my concern -- look, I don't think we  
10 have a problem generally with doing video testimony, and I  
11 think there is even a provision in your order or the proposed  
12 order related to that.

13 What I would be concerned with is if a witness is  
14 testifying sitting next to someone that has a senior position  
15 to them, then they may be in a situation where they are less  
16 candid in their testimony as a result of the pressures they are  
17 getting. For example, some of the witnesses who were  
18 interviewed by the 9/11 Commission indicated that their  
19 impression was the people they were speaking to were not  
20 especially candid, and they attributed some of that to the fact  
21 that they were sitting beside some senior Saudi officials who  
22 may have had a position of authority over them. I would not  
23 want it to be the situation where that is where the witness  
24 would be sitting testifying at a trial.

25 THE COURT: Just to be clear, I think the protocol

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1 contemplates video depositions for discovery purposes. I think  
2 what Mr. Cottreau was referring to was whether or not the  
3 parties could all agree that certain witnesses be allowed to  
4 testify live by video feed at trial, which would therefore make  
5 those witnesses who might otherwise be, quote-unquote,  
6 unavailable to come to the United States, and therefore subject  
7 to a preservation deposition, that there would no longer be  
8 that need because they would be available at trial, they would  
9 just come by video. I think that is what Mr. Cottreau was  
10 referring to.

11 MR. HAEFELE: Your Honor, we would be open to some  
12 arrangement of that nature.

13 THE COURT: I think to speak to your concern, two  
14 things. One, presumably if the Saudi government, for example,  
15 was asserting pressure on a particular witness, that pressure  
16 is going to be hard to uncover and prevent in a general matter.  
17 But two, I think we could all agree that witnesses who are  
18 testifying at trial would have to sit in a certain environment  
19 that the parties and the court would agree upon, which would be  
20 one where there was no nobody who could exert undue influence  
21 in the room and it would be in a safe or secured location.

22 MR. HAEFELE: Thank you, your Honor.

23 THE COURT: I am going to think about all of this,  
24 including what the appropriate number of depositions should be  
25 in this case.

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1           My next question, obviously your answer is affected by  
2           the number that I allow for depositions, but can we talk  
3           generally about the request for depositions to go through  
4           towards September 2019. That's 18 months away. Even if I  
5           permit 100 depositions on either side, given the number of  
6           lawyers on this case, 200 depositions is not a number that  
7           ordinarily takes a year and a half to complete.

8           I have plenty of highly complex litigation where  
9           people are taking dozens of depositions in a month. It's not  
10          clear to me why in this case, where I think there's even more  
11          lawyers involved, it would take 18 months to complete 200  
12          depositions.

13          Mr. Haefele, do you want to respond first?

14          MR. HAEFELE: I think some of it has to do with  
15          complexity and some of the lawyers that have come on are new.  
16          I don't think they are up to speed in terms of the liability.

17          Is your Honor talking about the lawyers that are  
18          coming in on the new cases or are you talking about the lawyers  
19          who are on the PTC who have been involved in the litigation for  
20          some time?

21          THE COURT: I haven't been assuming that lawyers that  
22          have just filed their first case are going to be the people who  
23          will be taking a lot of these depositions. Maybe I am wrong  
24          with how you're distributing the workload. But I assume there  
25          are a core group of lawyers who are conducting the majority of

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1 these depositions, but I also assume that that core group of  
2 lawyers is at least 20 strong, if not 30 or 40 strong.

3 MR. HAEFELE: I think your Honor is correct in the  
4 sense that it is the core group of lawyers and they are a core  
5 group that are involved more in the briefing and a lot of the  
6 other work. But in terms of taking the depositions, I think  
7 that number starts to shrink some.

8 I think we can certainly try and expand our numbers  
9 and take some of the people who are working in the briefing  
10 capacity and move them over into the deposition-taking  
11 capacity, but I don't think it is where you're looking at that.

12  
13 MR. COTTREAU: We would like to move the case along as  
14 expeditiously as possible. I think the reason for some of the  
15 scheduling -- we think it is aggressive, even our proposal of  
16 50 depositions per side, we still think it is a very aggressive  
17 schedule. Some of the defendants are represented by fairly  
18 small law firms with not as many lawyers as my law firm has,  
19 although we have a fairly constrained team on this case as  
20 well.

21 We also have other considerations here, which is a lot  
22 of these depositions we anticipate going forth with a  
23 translator. So they will be stretched out over two to three  
24 days depending on how things play out. And a lot of these  
25 depositions obviously will be taking place abroad in Western

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1 Europe. Working through some of the visa issues and other  
2 governmental permissions that we may need for some of the U.S.  
3 witnesses, we just anticipate taking year and a half time.

4 MR. HAEFELE: If I could add on to what Mr. Cottreau  
5 said. I think we are actually in agreement on this.

6 Some of the constraint, in terms of the number of  
7 lawyers, concerns the fact that a lot of these, as your Honor  
8 probably understands, are going to be done overseas, and you're  
9 talking about a number of lawyers traveling, doing multiple  
10 depositions perhaps at a time.

11 I think Mr. Cottreau will agree with me that some of  
12 the defendants are not available for stretches of time due to,  
13 for example, Ramadan and other holidays. I think your Honor  
14 has also indicated previously that in a number of depositions,  
15 Friday is off the calendar in terms of the number of days that  
16 we can do depositions.

17 THE COURT: OK. Let me take a very brief recess for a  
18 moment.

19 (Pause)

20 THE COURT: OK. I think I have gotten all of the  
21 information that I need from all of you. We will get an order  
22 out shortly.

23 I think it was Mr. Cottreau who made a comment about  
24 visas and all other bureaucratic complications. The parties  
25 should be moving forward now. Certainly there are depositions

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1 that you know you are going to be taking. You should be  
2 discussing now when those are going to be start.

3 It's been my understanding and expectation that the  
4 parties would start taking depositions in April or May, and I  
5 expect that to be in the works now.

6 So I don't want sort of unnecessary bureaucratic  
7 problems to come up late in this process. So people should  
8 know when Ramadan is going to be this year and make  
9 accommodations so that there is no surprises toward the end of  
10 this process.

11 MR. SALERNO: At some point I need to clarify  
12 regarding point number one on today's agenda.

13 THE COURT: Sir, we are getting a lot of feedback from  
14 your call. Maybe if you got off speakerphone, if you're on  
15 speakerphone.

16 MR. SALERNO: I am on a headset, but I will try to get  
17 off it. Sorry.

18 Is this better?

19 THE COURT: Much better.

20 MR. SALERNO: Our issue with respect to point one -- I  
21 don't know if you heard me on that -- I got some sense of the  
22 discussion that jurisdictional -- defendants in jurisdictional  
23 discovery would have to be covering the merits also.

24 I'm not sure that was what was intended, and we think  
25 it's a problem. Our client, Mr. Kadi, was remanded by the

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1 Second Circuit only for jurisdictional discovery. We accept  
2 the proposition that if there is anybody at all who is deposed  
3 while we are still in the case, we won't want to depose him a  
4 second time if, for example, we lose the jurisdictional motion.

5 But if we, having taken certain depositions that we  
6 think are necessary, if any -- and, by the way, we haven't  
7 thought of any that we need -- we make a motion to dismiss on  
8 jurisdictional grounds and lose, we think we should be entitled  
9 to merits discovery of witnesses, at least those who had never  
10 been deposed before in the case.

11 I just wanted to make it clear. I would hope that we  
12 would have that right, because I think we should.

13 THE COURT: Well, I am not quite sure how we would  
14 protect against that. This is a massive case where hundreds of  
15 thousands of dollars and more like millions of dollars is being  
16 spent on the discovery phase, and I don't think it's fair to  
17 everybody else in the case for you to come back into deposition  
18 mode two years from now when you have had a decision on the  
19 jurisdictional issue, go up to the Circuit and potentially the  
20 Supreme Court and then come back down and seek to reopen  
21 discovery.

22 So I appreciate your client's general interest in a  
23 much smaller case that might be prevailing, but I don't know  
24 how in this circumstance anything other than requiring your  
25 client to take all of the depositions that it would take for

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1 the merits as well as jurisdiction, how anything other than  
2 that would be fair to everybody else.

3 MR. SALERNO: I understand that position and I guess  
4 obviously we have to live with whatever your Honor directs.

5 MR. KRY: Your Honor, I would just note that we share  
6 Mr. Salerno's concern.

7 THE COURT: There was a mention about whether or not  
8 there were certain depositions that could be conducted -- I  
9 think Mr. Salerno said this. If there were depositions that  
10 were not taken by the parties as part of the merits discovery  
11 because nobody thought witness A needed to be deposed, whether  
12 or not it would be fair to allow defendant Kadi or Dallah Avco  
13 to depose witness A four years from now. I guess that's one  
14 question we could discuss. But I guess to require a witness to  
15 appear more than once seems unfair to accommodate just these  
16 two defendants.

17 MR. SALERNO: We are not asking any witness to appear  
18 more than once. We accept the proposition that that shouldn't  
19 happen. We are just talking about people who have never been  
20 deposed.

21 MR. KRY: Our position is the same.

22 THE COURT: So you would like permission to seek leave  
23 from the court for some additional depositions that had not yet  
24 occurred long after the close of discovery if your client is  
25 still in the case?

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1 MR. SALERNO: It would be more like if the client  
2 comes back in.

3 As I said, we were remanded only for what is normally  
4 thought of as a preliminary issue in the case. Theoretically  
5 the scope of the remand is the scope of what we should be doing  
6 here. I assure you we don't want to be back in the case in  
7 four years if we get out now. We may not get out now. We may  
8 be in. And even then we think we should be entitled to some  
9 merits discovery, precisely because that wasn't part of the  
10 remand initially.

11 I think we have a right to get our discovery if we are  
12 brought back in the case and we get out too, in either  
13 situation.

14 THE COURT: I understand your sort of legal arguments.  
15 In the context of a complex litigation like this, it's hard to  
16 implement those concerns.

17 For instance, we have been discussing that your client  
18 would not be able to object at a deposition that it was going  
19 beyond the scope of jurisdictional discovery, that there might  
20 be merits questions asked of your witnesses as part of the  
21 general discovery that the parties are taking.

22 MR. SALERNO: That's not our concern, frankly. First  
23 of all, we don't plan to take any depositions in the  
24 jurisdictional phase. We certainly expect that the plaintiffs  
25 will. They will probably want to depose our client. We don't

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1 intend to object to any questions posed to our client on the  
2 ground that it's outside jurisdictional but might be within  
3 merits. That would not be our position.

4 There we would be relying on the rule that I think we  
5 are establishing that every witness gets deposed only once. We  
6 accept that rule.

7 THE COURT: OK. I understand your position. Let me  
8 take it under advisement.

9 Anyone other than Dallah Avco and Kadi who take that  
10 view?

11 OK. Well, thank you, all.

12 I appreciate everybody's thoughts, and I will get an  
13 order out as soon as possible.

14 (Adjourned)